

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH NATHAN PEREZ,

Defendant-Appellant.

UNPUBLISHED
February 28, 2008

No. 275510
Kent Circuit Court
LC No. 05-011990-FC

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

A jury convicted defendant Joseph Perez of one count of second-degree criminal sexual conduct (“CSC”).¹ The trial court sentenced Perez as an habitual offender, third offense,² to 129 to 360 months’ imprisonment. We affirm.

I. Basic Facts And Procedural History

The primary witness at trial was the complainant, who testified that Perez was her uncle and that he had engaged in multiple sexual penetrations with her in both her mother’s house located in Calhoun County and her father’s house located in Kent County. The complainant said that she fell in love with Perez but also grew to be terrified of him after he punched her in the eye for allegedly flirting with male friends. Perez also destroyed clothes belonging to the complainant that he felt were too revealing, expressed disapproval over her makeup, discouraged her friendships, choked her and forced her to have sex on one occasion, and threatened to kill her should she disclose their sexual relationship to others.

¹ MCL 750.520c(1)(b) (sexual contact with a person at least 13 but less than 16 years of age and who is related by blood or affinity to the fourth degree).

² MCL 769.11.

II. Sentencing

A. Standard Of Review

Perez's sole argument on appeal is that the trial court improperly scored offense variable ("OV") 7, OV 11, OV 13, and OV 19. Perez preserved his arguments with respect to OV 11 and OV 13 by his objections made at sentencing. Therefore, this Court for an abuse of discretion reviews the trial court's scoring of points of those offense variable.³ However, because Perez did not preserve his arguments concerning OV 7 and OV 19, this Court reviews the scoring of those offense variables for plain error.⁴

B. Sentencing Standards

(1) OV 7

The trial court scored 50 points for OV 7. Under MCL 777.37(1)(a), a trial court should assess 50 points for OV 7 when a victim was treated with "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Perez argues that the proper score should have been zero because there was no indication that the complainant was afraid of him during the offense or that he did anything during the offense that increased the complainant's fear. We disagree.

Over the approximately ten-month course of their relationship, Perez intimidated the complainant into complying with his demands for sex. Perez's pattern of conduct, which included punching the complainant, destroying her clothes, forcing her to have sex, and threatening to kill her should she disclose their relationship, supported a finding that Perez treated the complainant with conduct that was designed to substantially increase the fear and anxiety felt by her during the offense.

(2) OV 11

The trial court scored 50 points for OV 11. Under MCL 777.41(1)(a), a trial court should assess 50 points for OV 11 when "[t]wo or more criminal sexual penetrations occurred." Perez argues that there was no evidence that two or more acts of penetration occurred at the same place, under the same set of circumstances, and during the same course of conduct. We agree, but we find the error harmless.

Perez was charged with committing two counts of first-degree CSC. Although the jury convicted Perez of second-degree CSC based on contact, the trial court was permitted for sentencing purposes to reach the different conclusion that penetration had occurred.⁵ However, a

³ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

⁴ *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

⁵ See *People v Perez*, 255 Mich App 703, 713; 622 NW2d 446, vacated in part on other grounds 469 Mich 415 (2003).

penetration can be scored under OV 11 only if it “aris[es] out of the sentencing offense.”⁶ “Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense [are to] be scored in offense variables 12 or 13.”⁷ Therefore, the sentencing court abused its discretion when it assessed 50 points for OV 11. The proper score should have been 25 points under MCL 777.41(1)(b). However, this error was harmless because the corrected score would be 145 points, which does not result in a different recommended range.⁸

(3) OV 13

The trial court scored 25 points for OV 13. Under MCL 777.43(1)(a), a trial court should score 25 points for OV 13 when the offense “was part of a pattern of felonious criminal activity involving 3 or more crimes against a person[.]” Perez argues that by scoring OV 13 at 25 points, the trial court effectively nullified the jury’s verdict that Perez had not sexually penetrated the complainant. We disagree.

As stated, the trial court was permitted for sentencing purposes to reach the conclusion that penetration had occurred.⁹ The record showed that the complainant’s testimony provided sufficient evidence for the trial court to find that Perez committed more than three crimes against her within the past five years. The complainant testified that she and Perez engaged in intercourse on probably a weekly basis for a period of about ten months, and she was 14 to 15 years old at the time of these offenses. Even if the one act of penetration already scored in OV 11 was not counted, there was evidence of multiple other instances of sexual penetration.

(4) OV 19

The trial court scored 15 points for OV 19. Under MCL 777.49(b), a trial court should assess 15 points under OV 19 when “[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice[.]” Perez argues that the sentencing court improperly scored OV 19 at 15 points because there was no evidence that he hindered the investigation into the allegations, prevented the complainant from talking to the police, avoided arrest, or attempted to flee. We disagree.

The record shows that Perez threatened to kill the complainant if she told anyone about their sexual relationship. This alone was sufficient to warrant the trial court’s assessment of 15 points under OV 19.¹⁰ Therefore, the threat when taken together with Perez’s other actions, such as punching the complainant, destroying her clothes, and choking her and forcing himself on her,

⁶ MCL 777.41(2)(a).

⁷ MCL 777.41(2)(b).

⁸ MCL 777.21(3)(b); MCL 777.64.

⁹ See *Perez*, *supra* at 713.

¹⁰ See *People v Endres*, 269 Mich App 414, 421; 711 NW2d 398 (2006) (the defendant’s threat to kill the victim warranted assessment of 15 points for OV 19).

was more than sufficient evidence for the trial court to find that Perez's force and threats of force effectively prevented the complainant from disclosing the relationship and, therefore, impeded the administration of justice.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Alton T. Davis